IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 23, 2006 Session

ROBERT MURPHY, ET AL. v. EARL SAVAGE, JR., d/b/a/ SAVAGE BUILDERS, ET AL.

Appeal from the Circuit Court for Knox County
No. 2-542-04 Harold Wimberly, Judge

No. E2005-01441-COA-R3-CV - FILED JULY 6, 2006

The issue presented in this case is whether privity of contract is required to maintain a cause of action under the Tennessee Consumer Protection Act. The plaintiff homeowners filed a complaint alleging that the defective construction of their residence by the defendant building contractor and subcontractor resulted in flooding and consequential personal and property damage. The homeowners also sued the defendant contractor's insurance carrier under the Tennessee Consumer Protection Act, alleging that the insurer engaged in deceptive practices in processing the plaintiffs' claim. The trial court granted the insurer's motion to dismiss upon grounds that there was no privity of contract between the insurer and the plaintiffs. We reverse the judgment of the trial court and remand upon our determination that privity of contract is not required in order to maintain a cause of action under the Act.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Robert W. Knolton and Thomas C. Cravens, IV, Oak Ridge, Tennessee, for the appellants, Robert and Julia Murphy.

Earl R. Booze, Johnson City, Tennessee, for the appellee, Central Mutual Insurance Company.

OPINION

I. Background

In November of 2000, Robert and Julia Murphy entered into a written contract with Earl Savage, Jr., d/b/a Savage Builders (hereinafter "Savage Builders"), for the construction of a residence. Concrete for the house was poured by Jeff Chesney and Jody Muncey, d/b/a Quality Concrete Finishing (hereinafter "Quality Concrete"), subcontractor for Savage Builders. The Murphys allegedly became aware of defects in the house's construction, and, in September of 2004, they sued Savage Builders, Quality Concrete, and Savage Builder's liability insurance carrier, Central Mutual Insurance Company (hereinafter "Central"). *Inter alia*, the complaint alleged that the house was constructed near a sinkhole and that Savage Builders violated a Knox County policy statement for development of real property located in a sinkhole area. The complaint further alleged that Knox County building codes were violated in constructing the house, that negligent construction of the house made the house susceptible to constant flooding which resulted in the proliferation of mold in the house, and that sale of the house was precluded because the house failed to pass final inspection, and no certificate of occupancy was issued. Based upon these and other allegations, the complaint charged Quality Concrete with negligent construction and Savage Builders with negligent construction, breach of contract, and breach of implied warranty of habitability. The complaint also charged Central with bad faith and violation of the Tennessee Consumer Protection Act, as follows:

> That Central Insurance Company, through its agents, expert and adjusters, operated in bad faith by repeatedly stating and implying that it would remedy the problems caused by the defendants, but has failed to fulfill its obligations to do so.
>
> That, as a direct and proximate result of Central Insurance Company's bad faith, the flooding and mold infestation has continued and caused additional damages to personal property, additional damages to the house, and addition [sic] health problems for the Plaintiff.
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> That Central Insurance Company violated the Tennessee Consumer Protection Act, which provides at Tennessee Code Annotated Section 47-18-104(b)(22) that "engaging in any act or practice which is deceptive to the consumer or to any other person" by providing false and misleading statements to Plaintiffs regarding the repair of the house.
>
> That, as a direct and proximate effect, of Defendant Central Insurance Company's false and misleading statements, by failure to fulfill its promises to repair the premises of the Plaintiffs, the flooding and

> mold infestation has continued and caused additional damages to personal property, additional damages to the house, and additional health problems for Mrs. Murphy. Plaintiff sues such Defendant for civil damages pursuant to T.C.A. 47-18-109.

The complaint sought judgment against Savage Builders for compensatory damages in the amount of $500,000 and punitive damages in the amount of $500,000 against all the defendants. The complaint further requested that Central be ordered to pay treble damages "for its deceptive acts engaged in during the claim process pursuant to the provisions of the Tennessee Consumer Protection Act."

On March 7, 2005, Central filed a motion to dismiss under Tenn. R. Civ. P. 12.02 for failure to state a cause of action upon which relief may be granted. The motion stated in pertinent part, as follows:

> As a general proposition and rule of law, a party has no right of action against a defendant's insurer unless pursuant to contract or a specific statutory provision grants a direct right of action. 29 Am. Jur. 810, Insurance § 1080.
>
> There is no privity of contract between the Plaintiffs and the Defendant, CENTRAL, and as such, no direct action can be maintained. Tennessee is not a 'direct action' state wherein a Plaintiff can sue the liability insurance carrier of the Defendant who allegedly caused the harm. *Seymour v. Sierra,* 98 S.W.3d 164 (Tenn. Ct. App. 2002).
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> Plaintiffs allege that Defendant, CENTRAL, negotiated in bad faith and as such constitutes a violation of the *Tennessee Consumer Protection Act*, T.C.A. § 46-18-104(b)(22); however, no privity of contract existed between the Plaintiffs and the Defendant, CENTRAL. In any event, settlement negotiations are inadmissible pursuant to Rule 408 of the Tennessee Rules of Evidence.
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> Defendant, CENTRAL, is not the uninsured/underinsured carrier for the Plaintiffs, nor does any privity of contract exist between Defendant, CENTRAL, and the Plaintiffs, and therefore, no basis for a direct suit.
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> WHEREFORE, Central Mutual Insurance Company respectfully requests this Honorable Court, pursuant to Rule 12.02, Tennessee Rules of Civil Procedure, to dismiss the Complaint against this Defendant.

Central's motion came on for hearing after which, on May 19, 2005, the trial court entered an order granting the motion upon determining that the Murphys could not maintain a direct cause of action against Central under the Tennessee Consumer Protection Act absent privity of contract. This appeal followed.

II. Issue

The sole issue we address in this case is whether the Tennessee Consumer Protection Act allows a plaintiff to maintain a direct cause of action against an insurer for violation of the Act even though the plaintiff and the insurer are not in privity of contract.

III. Standard of Review

We restated the standard of review with respect to a motion to dismiss for failure to state a claim upon which relief may be granted under Tenn. R. Civ. P. 12.02(6) as follows in *Pendleton v. Mills*, 73 S.W.3d 115 (Tenn. Ct. App. 2001):

> The sole purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to test the sufficiency of the complaint, not the strength of the plaintiff's evidence. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). It requires the courts to review the complaint alone, *Daniel v. Hardin County Gen. Hosp.*, 971 S.W.2d 21, 23 (Tenn. Ct. App. 1997), and to look to the complaint's substance rather than its form. *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn. Ct. App. 1995). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity. *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).
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> A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Winchester v. Little*, 996 S.W.2d 818, 821-22 (Tenn. Ct. App. 1998); *Smith v. First Union Nat'l Bank*, 958 S.W.2d 113, 115 (Tenn. Ct. App. 1997). Accordingly, courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Stein v. Davidson Hotel*, 945 S.W.2d 714, 716 (Tenn. 1997), and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5-6(g), at 254 (1999). On

> appeal from an order granting a Tenn. R. Civ. P. 12.02(6) motion, we must likewise presume that the factual allegations in the complaint are true, and we must review the trial court's legal conclusions regarding the adequacy of the complaint without a presumption of correctness. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furnen & Ginsburg, P.A.*, 986 S.W.2d at 554; *Stein v. Davidson Hotel*, 945 S.W.2d at 716.

Pendleton, 73 S.W.3d at 120-121.

IV. Analysis

The Tennessee Supreme Court has ruled that exempting an insurance company from the purview of the Tennessee Consumer Protection Act ("TCPA") frustrates the Act's purposes. *Myint v. Allstate Insurance Co.*, 970 S.W.2d 920, 926 (Tenn. 1998). One of the stated purposes of the Act, as set forth at T.C.A. §47-18-102(2), is "to protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." As indicated in the Murphys' complaint, their cause of action against Central is based upon allegations that Central deceived the Murphys by making false and misleading statements in the process of addressing their claim.

While Central agrees that the TCPA extends to insurance companies, Central contends, and the trial court ruled, that a direct cause of action against an insurer is not allowed under the TCPA absent privity of contract. We respectfully disagree.

Central cites only one case, *Seymour v. Sierra*, 98 S.W.3d 164 (Tenn. Ct. App. 2002) in support of the trial court's dismissal of the Murphys' complaint upon grounds that there was no privity of contract between the parties. In *Seymour*, the plaintiffs were injured in an automobile accident and filed suit against the owner and driver of the other car. A copy of the complaint was also served upon the plaintiffs' own insurance carrier. Thereafter, the defendant driver and owner could not be located, and service of process was returned "not to be found." Tennessee statutory law provided that if service of process issued against an uninsured motorist was returned "not to be found," service of process against the plaintiff's uninsured motorist carrier would be "sufficient for the court to require the insurer to proceed as if it is the only defendant in such case." *Id.* at 166. However, the plaintiffs' uninsured motorist carrier argued that this statute did not apply because it had been shown that the defendants were insured. The plaintiffs contended that the defendants were uninsured because the liability limits under the defendants' policy were less than the uninsured coverage under the plaintiffs' policy. We affirmed the trial court's denial of the plaintiffs' insurer's motion for summary judgment, ruling that the term "uninsured" included an underinsured motorist. Central relies on our statement in *Seymour* that "Tennessee is not a 'direct action' state where a plaintiff can sue the liability insurance carrier of the defendant who allegedly caused the harm." *Id.* at 165. Clearly, this statement is not applicable in the matter now before us which involves suit against an insurance carrier under the TCPA for actions alleged to have been committed by the

carrier itself, not its client. In the instant case, with regard to violation of the Act, the insurance carrier *is* the defendant who allegedly caused the harm.

Review of the TCPA reveals no requirement that there be privity of contract between a consumer and an entity the consumer has charged with unfair or deceptive practices under the Act. Further, the Tennessee Supreme Court has stated that the TCPA "is to be liberally construed to protect consumers and others from those who engage in deceptive acts or practices." *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992). Consistent with that spirit of construction, we have on prior occasion indicated that privity of contract is *not* required in order to maintain a cause of action under the TCPA. In *Heatherly v. Merrimack Mutual Fire Insurance Company*, 43 S.W.3d 911 (Tenn. Ct. App. 2000), the plaintiff homeowners filed a claim with their insurance carrier after their house was damaged by fire. The carrier employed two outside adjustors to investigate the claim, rather than utilizing its own adjustors. Subsequently, the plaintiffs became dissatisfied with the processing of their claim and filed a cause of action against both the carrier and the two adjustors for breach of contract, negligence, and violation of the TCPA. All three defendants filed a motion to dismiss the complaint as to the adjustors for failure to state a claim upon which relief could be granted, in part upon grounds that the plaintiffs did not have a contract with the adjustors. The plaintiffs conceded that the complaint failed to state a breach of contract claim against the adjustors, the only contract being that between the plaintiffs and the carrier. However, we noted in that case that the absence of a contract did not necessarily defeat the plaintiffs' negligence and TCPA claims against the adjustors, and we specifically stated that "[p]rivity of contract is not required for consumer protection act claims." *Id*. at p. 915. In *Terrell v. United Van Lines, Inc.*, 2005 WL 1000231, No. E2004-00407-COA-R3-CV (Tenn. Ct. App. E.S. Apr.29, 2005), *appl. perm. app. denied* Dec. 5, 2005, the plaintiffs filed a cause of action against a moving service for property damage. The plaintiffs filed a motion to amend their complaint to add a Tennessee Consumer Protection Act claim against the moving company's insurer. The insurer filed a motion to dismiss, stating that it had no policy or contractual relationship with the plaintiffs. The trial court granted the motion to dismiss and denied the plaintiffs' motion to amend upon determining that the plaintiffs had failed to show any ascertainable loss, as required under the Act. Although we affirmed the trial court's decision upon grounds that the plaintiffs had failed to show an ascertainable loss, at the same time, we noted that the TCPA is applicable to the acts of an insurance company and that privity of contract is not required. *Id.* at * 2.

Although absence of privity of contract was the only ground for dismissal asserted by Central in its motion to dismiss the Murphys' complaint, and that was the sole ground relied upon by the trial court in granting such motion, Central now argues that the Murphys' lawsuit should be dismissed upon the alternative grounds that the Murphys failed to demonstrate elements which are required to maintain a cause of action under the TCPA. In this regard, Central alleges that the Murphys failed to demonstrate that they suffered a substantial ascertainable loss that was the result of a deceptive or unfair act, that they fall within the class of persons protected by the TCPA or that the conduct complained of affects trade or commerce and was not reasonably avoidable, or outweighed by countervailing benefits.

As a general matter, issues not raised at trial may not be raised for the first time on appeal. *Simpson v. Frontier Comm. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991). While we acknowledge that we may, in our discretion, address issues not previously raised, we are not compelled to do so under the circumstances of this case.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is reversed, and the case is remanded for further action consistent with this opinion. Costs of appeal are assessed to the appellee, Central Mutual Insurance Company.

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SHARON G. LEE, JUDGE